IN THE HIGH COURT OF BOMBAY AT GOA

REFERENCE APPLICATION UNDER CUSTOMS ACT NO.2 OF 2003

AND MISCELLANEOUS CIVIL APPLICATIONS NO.537 AND 691 OF 2003.

REFERENCE APPLICATION UNDER CUSTOMS ACT NO.2 OF 2003.

Commissioner of Customs &
Central Excise, Goa,
Marmagoa, Goa. ... Applicant.

VERSUS

M/s. Adani Exports Ltd.
Ahmedabad-380 009. ... Respondent.

MISCELLANEOUS APPLICATION NO. 537 OF 2003.

Commissioner of Customs
& Central Excise, Goa,
Mormugao, Goa. ... Applicant.

VERSUS

1. M/s. Adani Exports Ltd.,
30, Adani House, Shrimali Society,
Near Mithakali Circle, Navrangpura,
Ahmedabad - 380 009.

2. Bank of India,
Through its Chief Manager,
Bhadra, Ahmedabad, 380 001. ... Respondents.

MISCELLANEOUS APPLICATION NO.691 OF 2003.

M/s. Adani Exports Ltd.,
30, Adani House, Shrimali Society,
Near Mithakali Circle, Navrangpura,
Ahmedabad - 380 009. ... Applicant.

VERSUS

The Commissioner of Customs
and Central Excise, Goa,
having his office at
Custom House, Marmagoa,
Goa. ... Respondent.

Shri V.P. Thali, Advocate for the Applicant/Central Excise.

Shri A.N.S. Nadkarni, with Shri S.M. Singbal, Advocates
for the Respondents/Applicant in Misc.Civil Application
No.691/2003.

CORAM: A.M. KHANWILKAR &
P.V. HARDAS, JJ.

DATE: 9TH DECEMBER, 2003.

ORAL ORDER: **(PER KHANWILKAR, J.)**

The applicant has preferred this Reference under Section 130A of the Customs Act, 1962 for answering the following questions :-

(i) Whether the Show Cause Notice dated 28.03.2000, was barred by time under Section 28(1) of the Customs Act, 1962.

(ii) Whether the Tribunal was correct in holding that the larger period of limitations prescribed under proviso to Section 28(1) was not applicable in the present case.

(iii) Whether the Tribunal should not have held that the Respondents were clearly guilty of suppression of facts in as much as they had produced incorrect Transfer Letters before the Customs at Mumbai Port for obtaining Release Advices.

(iv) Whether the Tribunal was correct in

not deciding the questions of liability to confiscation of the goods and imposition of penalty for which the notice was also issued under Section 124(1) of the Customs Act 1962, apart from the demand of duty under Section 28(1) of the Customs Act 1962.

(v) Whether or not the question of Show Cause Notice was being barred by time under Section 28(1) of the Customs Act 1962 was irrelevant in as much as the assessment were provisional and therefore the question of limitations under Section 28(1) of the Customs Act, 1962 does not arise.

(vi) Whether the Hon'ble CEGAT was correct in applying the judgement in the matter of M/s Purlux Electlric Pvt. Ltd., V/s Commissioner of Customs, Mumbai, reported in 2001 138 (ELT) 786 Tribunal, Mumbai to the facts at the case.

2. Briefly stated, the Commissioner of Customs by Order dated 31st January, 2001 has confirmed the Demand of Customs duty amounting to Rs.68,08,501/- and

Rs.16,08,194/- of Low Ash Metallurgical Coke "in terms of proviso of Section 28(1) of the Customs Act, 1962 and penalty imposed of equal amounts under Section 114 A along with penalty of Rs.25,000/- each on the Respondent-Company and its Director. The basis of confirmation of duty and imposition of penalty is that the Advance Licence produced by the respondent-Company was not valid for the import, since the re-validation and the transfer letters are not valid and the Company was therefore not entitled to import the goods thereunder and further that the Company had utilised value in excess of the value endorsed for metallurgical by utilising the value fixed for limestone.

3. Against the said decision, respondent-Company carried the matter in appeal before the Appellate Tribunal which, in turn, vide its Judgment and Order dated 24.2.2003 has allowed the appeal holding that the demand made against the respondent-Company was barred by limitation. For recording that opinion, the Tribunal has taken into account the fact that the respondent-Compnay imported the goods against value based Advance Licence dated 16.4.1994 issued in the name of Visakhapatnam Steel Plant, Vizag and the said licence was endorsed as transferable; the goods were imported by the appellant company as a transferee of the said licence which was revalidated upto 30.11.1998.

That licence was produced by the respondent company at Mumbai Custom House where it was registered and the proper officer issued Telegraphic Release Advice in respect thereof to the Assistant Commissioner of Customs, Goa and accordingly clearance was allowed duty free against the said licence. The Tribunal therefore held as a fact that there was no suppression or wilful mis-statement or mis-declaration by the respondent company. The Tribunal further found that, in fact in the Show Cause Notice there was no allegation of suppression or mis-declaration or wilful mis-statement against the respondent company, but the allegation was of mis-declaration against M/s Glamour Barter Pvt. Ltd. who were the earlier holders of the said licence and had transferred the same subsequently to the respondent Company. The Tribunal therefore held that the Order in question invoked the extended period of limitation against the respondent company only for the reason that it had produced incorrect transfer letters before Mumbai Customs for obtaining TRA. The Tribunal has also found that the authority had not recorded any finding against the respondent Company that the respondent Company had knowledge or was under reasonable belief that M/s Glamour Barter Pvt. Ltd. were not transferees of the Advance licence. In this backdrop, the Tribunal relied upon its earlier decisions in the case of **Purulax Electric (P) Ltd. Vs.**

Commissioner of Customs, Mumbai (2001 (138) E.L.T. 786 (Tri.Mumbai), Scientific Pharmacy Vs. Commissioner of

Customs, ACC, Mumbai (2001 (135) E.L.T. 1085) and the decision in the case of **Commissioner of Customs Mumbai Vs. Visakhapatnam Steel Plant and others Order No. C-I/3676-3714/01-WZB/dt. 22.11.2001** where the same advance licence along with other advance licences were involved in which the Tribunal followed its earlier decision in **Purulax Electric's case** (supra). In the circumstances, the Tribunal has held that the extended period of limitation cannot be invoked against the transferee for misrepresentation made by the transferor of the advance licence for import of goods in terms of the Notification No.203/92. It has also held that in view of the settled position, proviso to Section 28(1) of the Customs Act, 1962 was not attracted against the respondent Company. On the above reasoning, the Tribunal allowed the appeal and set aside the demands as time barred. In the circumstances, the Tribunal has not recorded any finding on the merits of the case.

4. Against this decision, the present reference has been filed by the applicant. This Court issued Notice in the Reference Application on 23rd September, 2003 as also granted ad-interim stay as prayed for by the applicant for directing the respondent company to keep alive the Bank Guarantee dated 23.2.1999 executed

by the Respondent No.1 of Respondent No.2 Bank for Rs.52,00,000/-. The respondent company, on being served with the notice, have entered appearance and filed Misc. Civil Application No.691/2003 for modifying and/or vacating the ad-interim order granted by this Court as referred to above. It is mianly contended in this application that the Reference Court has no jurisdiction to grant interim relief as is well settled principle in the case of **Commissioner of Income-tax, Delhi v. Bansi Dhar and Sons** reported in A.I.R. 1986 S.C., 421.

5. Mr. Thali for the Applicant, vehemently submits that the questions referred to above would arise for consideration out of the Order passed by the Tribunal and his Court should answer those questions. According to Mr. Thali, reliance placed on the decisions of the Tribunal in the impugned Order was inappropriate. In the first place, according to Mr. Thali, the said decisions have no application to the present case and the Tribunal has placed reliance on its earlier Order which was only interlocutory order and the prima facie opinion expressed therein cannot be the basis to finally answer the same issue. Moreover, there is no authoritative decision on the question, either of this Court or any other High Court or Supreme Court. Mr. Thali further contends that the Tribunal

has failed to examine various other points raised on behalf of the applicant which was the basis of the Order of demand issued against the respondent company and even for that reason this Court ought to interfere.

6. On the other hand, Mr. Nadkarni, learned Advocate contends that the Reference Application as filed by the applicant is entirely misplaced. He submits that, in fact the question as raised in this application stands finally answered by the Apex Court consequent to dismissal of Civil Appeal Nos.3488-3490 of 1998 on 8th December, 1999, by the Bench consisting of three Judges (Bharucha, Variava and Hegde, JJJ.) filed by the Commissioner of Customs, Calcutta against CEGAT Order No.A-79/98 dated 4.2.1998 and reported in **1999 (108) ELT 818 (Tribunal) Goodluck Industries v. C.C.E. Calcutta**. To support this position, he has placed reliance on (Vol.120) 2000 ELT A 66 where the order passed by the Supreme Court summalrily dismissing the appeals being without merit, is reproduced. Learned Advocate for the respondent submits that on the settled principle of doctrine of merger, the view expressed by the Tribunal on the issue in question in Goodluck Industries' case stands concluded and it is not open for this Court to examine the questions as formulated in the present application. Reliance is placed on the decisions of the Apex Court reported in

A.I.R. 2000 S.C., 2587 in the case of **Kunhayammed and others v. State of Kerala and another,** and A.I.R. 2000 S.C., 1623 in the case of **V.M. Salgaocar and Bros. Pvt. Ltd. v. Commissioner of Income-tax** to support the plea of doctrine of merger. He further submits that there is another good reason why no interference is warranted in the present Reference Application. According to him, the view expressed by the Tribunal in its earlier decision has been allowed to become final by the Department and if that is so, no interference was warranted in such a situation. He submits that nothing has been produced on record even now, inspite of adjournment granted in the past to ascertain as to whether any appeal or reference was carried against the decisions referred to by the Tribunal in the impugned order.

7. In that behalf Mr. Thali during the course of argument conceded that no information is available as to whether the decisions referred to in the impugned judgment were carried before the superior court by the Department at all. In the circumstances, Mr. Nadkarni, learned Advocate for the respondent, contends that since those decisions have been allowed to become final, it is not open for this Court to examine the matter any further. Reliance was placed on the decision of the Apex Court in the case of **Commissioner**

of Customs Excise, Calcutta v. Suntrack Electronics (P) Ltd. reported in 2002 (XC3) GJX 1647-SC. The

Supreme Court in that matter declined to entertain the appeal filed by the Department only on the ground that the Tribunal had relied upon its earlier order made in some other case which the Revenue had not chosen to challenge.

8. It is further contended that besides the previous decisions referred to in the impugned judgment of the Tribunal, there are other cases taking the same view and even those decisions have become final. Reliance is placed on the decision reported in 1999 (113) ELT 91 TRIB in the case of **M.C. Daver Aromatics P. Ltd. v. Commissioner of Customs, Mumbai** which decision was in fact followed in **Purulax Electric (P) Ltd.** which has been relied by the Tribunal in the impugned judgment. Besides, reliance is placed on 1999 (108) ELT page 818 **Goodluck Industries v. Commissioner of Customs, Calcutta.** This decision was relied by the Tribunal, insofar as the question involved in the present matter regarding limitation while deciding the case of **M.C. Daver Aromatics P. Ltd.** (supra). As mentioned earlier, the Department carried the decision in the case of Goodluck Industries before the Apex Court. However, those appeals have been dismissed by the Apex Court as being devoid of merit on 8th

December, 1999 which means that the view taken by the Tribunal in the said case which is consistently followed in the subsequent decisions has attained finality. Reliance is also placed on another decision reported in 1998 (XC2) -GJX-2957-TRIB - **Commissioner of Customs Bombay v. Jai Bhawani Concast Ltd.** where similar view has been taken by the Tribunal in that decision, that the importer cannot be required to prove eligibility for duty free import of permitted goods again once the goods have been imported after endorsement of the transferability of the advance licence by the proper authority and in that event the revenue is debarred from making any inquiry at the stage of import or transferability of the licence. In paragraph 5 of this decision it has been observed that once the proper authority makes endorsement of transferability of the licence, the importer cannot be required to prove once again the eligibility for duty free import of the imported goods. For taking this view, reliance has been placed by the Tribunal on its earlier decision in **Nitco Marble & Granite Pvt. Ltd. & anr. v. CC** (1996 (63) ECR 111 (T) para 4). Both these decisions have been allowed to attain finality by the Revenue. On the above basis, learned Advocate for the respondent contends that it is not open to the applicant/Department to agitate the questions raised in the Reference Application because the said questions

are alrealdy concluded by the decision of the Supreme Court and also because the decisions which have been relied by the Tribunal in the impugned judgment, have been allowed to become final by the Department as no appeal or further remedy is resorted to by the Department against those decisions.

9. Having considered the rival submissions, we have no hesitation in declining to enter into this reference. We accept the submission canvassed on behalf of the respondent company. It is not open for this court to examine the questions as formulated in this reference application because the principal issue regarding demand being barred by limitation finally stands concluded by the apex court in Civil Appeals Nos.3488-3490/1998 decided on 8.12.1999 in the case of Goodluck Industries (supra) as reported in Vol.120 (2000) ELTpage A 66. Indisputably in the impugned judgment, the Tribunal has placed reliance on its earlier decision in Purulax Electric (supra) which in turn has placed reliance on the decision in M.C. Daver Aromatics (supra) which relies on the earlier decision of the Tribunal in Goodluck Industries' case (supra). In that sense by dismissal of the appeals against the decision of the Tribunal in Goodluck Industries' case the issue stand finally answered that the proviso to section 28(1) of the Customs Act 1962 is not attracted

against the transferee of the advance licence. As rightly observed by the Tribunal neither there is an allegation in the show cause notice issued to the respondent company, nor there is a finding recorded by the authority that the respondent company had the knowledge or was under the reasonable belief that M/s. Glamour were not transferees of the advance licence.

10. Understood thus, the demand as against the respondent company being the transferee was clearly barred by limitation. It is not open as rightly contended by the respondent to examine the correctness of the view taken by the Tribunal on the interpretation of the said provisions, as that view has already attained finality by the dismissal of the appeals by the apex Court.

11. We also accept the submission canvassed on behalf of the respondent that it will not be open for this Court to enter into reference because the Department has not challenged the various decisions referred to by the Tribunal in the impugned judgment. In other words, the Department having failed to challenge or having accepted the said decisions, it was not open for them to take the present decision before the superior court on the principle underlying the decision of the Apex Court in **Commissioner of Central**

Excise, Calcutta v. Suntrack Electronics (P) Ltd. (supra). Even for this reason we are not inclined to entertain this reference.

12. In our view it is not necessary for us to examine any other aspect of the matter because the Tribunal has set aside the demand only on the ground that the same was barred by limitation. In other words, any other question except demand being barred by limitation would not arise for consideration out of the impugned order of the Tribunal in this reference proceedings.

13. For the aforesaid reasons, we see no substance in this reference. The same is therefore dismissed.

14. Insofar as the Misc. Civil Application filed by the Commmissioner of Customs being Misc.Civil Application No.537/2003, the same is also dismissed in view of the dismissal of the main reference application. Ad-interim order which was granted earlier to stand vacated forthwith. In view of the above order, no further orders are warranted in Misc. Civil Application No.691/2003. In the event we were required to examine the said application, we would have accepted the argument of the respondent company that the High Court has no inherent power or incidental

power to grant stay or injunction in reference proceedings for that authority is only when the Court would exercise appellate jurisdiction or writ jurisdiction **(See Commissioner of Income Tax v. Bansi Dhar and Sons** A.I.R. 1986 S.C., 421).

Accordingly these applications are also disposed of.

A.M. KHANWILKAR, J.

P.V. HARDAS, J.

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